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REA COOPERATIVES AND THE FEDERAL WAGE AND HOUR ACT

The Fair Labor Standards Act of 1938, generally known as the Wage and Hour Act, 52 Stat. 1060, 29 U.S.C.A. Section 201, et seq. applies to all employees engaged in interstate commerce or in the production of goods for interstate commerce. The proportion of interstate to intrastate commerce is immaterial and there is no exemption accorded a cooperative by reason of its status as such. (Interpretative Bulletin No. 10, Wage and Hour Division).

"Employer" is defined in Section 3(d) of the Act as "any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State. . .". No exemption may be claimed on the basis that an employee of an electric cooperative is an employee of the United States since such corporations obtaining loans from REA are privately owned corporations. In some instances, however, exemption for employees of a "political subdivision of a State" may be applicable. For example, in Nebraska borrowers are "political subdivisions of the State" and are exempted. This problem must be investigated in each particular case. In North Carolina the legislature has declared electric membership corporations to be "public agencies". It would seem, however, that "public agencies" do not come within the definition of "political subdivisions", for this purpose.

Once it is determined that the cooperative is engaged in interstate commerce, it remains to be established in each case whether any given employee is entitled to the benefits of the Act. While generally, employees engaged in maintenance, operation and office work are within its coverage, "employees employed in executive, administrative and professional capacities" are exempt. However, the statutory and regulatory definition of employees within the quoted categories are technical and limited. For further information as to what constitutes an "executive", "administrative" or "professional" employee, see Part 541, Wage and Hour Division Bulletin. For example, employees to fit within certain of the above categories must receive a minimum compensation of $30 per week.

The minimum wage requirement is 30 cents per hour and the maximum hours per workweek are 40. Maximum hours of work are not limited, however, but for hours worked in excess of 40 per workweek, the employee must receive compensation at the rate of not less than one and one-half times the regular hourly rate at which he is employed.

Wages may be paid on a weekly, semi-monthly or monthly basis. When translated into an hourly rate of pay, however, the wage must equal or exceed 30 cents per hour. In relation to the hour provision, however, there can be no averaging of hours of any workweeks since the Act

is set up on the basis of a workweek and overtime compensation is allotted when in any given workweek the number of hours worked exceeds 40. If wages are paid on a semi-monthly basis, compensatory leave during the second half of the pay period may be granted in lieu of overtime wages. The compensatory leave must be at the rate of one and one-half times the amount of overtime hours worked during the first half of the pay period. For example, an employee limited to a 40-hour week works 44 hours from the 1st to the 7th of a month. The employee is paid semi-monthly. If the employee works only 34 hours during the second half of this pay period, i.e., 6 hours equal one and one-half times the 4 hours overtime, no overtime wages need be paid. It should be noted that this rule may operate only where the employer has been habitually using a semi-monthly pay period--the pay period may not be changed for the purpose of avoiding overtime compensation pursuant to the Wage and Hour Act.

There is a requirement that records, open for inspection, be kept by every employer, showing wages, hours and other conditions and practices of employment. Records must be kept for a period of four years. No particular form is specified, provided the requisite information is readily available.

On February 3, 1941, the United States Supreme Court handed down its decision in the case of U.S. of America v. Darby Lumber Company. The constitutionality of the Act was upheld. In doing so the Court specifically overruled Hammer v. Dagenhart, 247 U.S. 251, 62 L. Ed. (1913). In that case Congress was held to be without power to exclude the products of child labor from interstate commerce. That power was held limited to the prohibition in interstate commerce of articles which in themselves contain some harmful or deleterious property. As a matter of fact the Hammer case had not been followed. The Darby case in following the powerful dissent of Mr. Justice Holmes reaches the conclusion that the power of Congress under the Commerce Clause is plenary to exclude any article from interstate commerce, subject only to the specific prohibitions of the Constitution. Thus, Congress can prohibit the shipment in interstate commerce of lumber manufactured by employees whose wages are less than a prescribed minimum or whose weekly hours of labor at that wage are greater than a prescribed maximum, and can prohibit the employment of workmen in the production of goods for interstate commerce at other than prescribed wages and hours.

The Supreme Court has now simplified the concept of interstate commerce. This has not, of course, ended all issues. Many specific questions remain. This discussion will be limited to a few which have application to REA Cooperatives.

Simplification of the Commerce Clause renders important interpretations of the Wage and Hour Division as to coverage under the Act. In I.C.C. v. American Trucking Association, 8 U.S. Law Week 919 (May 27, 1940), (The Wage and Hour Division intervening), it was stated on page 921 concerning interpretations of the Interstate Commerce Commission and the Wage and Hour Division "in any case such interpretations are entitled to great weight. This is particularly true here where the interpretations involve . . . contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new" (Norwegian Nitrogen Company v. U.S., 288 U.S. 294, 315). (underscoring added). The viewpoint of the Wage and Hour Division will, therefore, be indicated.

While Congress may now regulate wages and hours of employees engaged in the production of goods for interstate commerce, there has been no judicial interpretation of what constitutes "production of goods for interstate commerce". The Wage and Hour Division indicates that the definition will include any "process or occupation necessary to the production" of other goods which move out of the state

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of production. Inter. Bull. No. 5 (Rev. October, 1940) Par. 11. This is indeed the broadest possible interpretation. Does this cover the case of a cooperative serving a dairy within a state which dairy in turn sends its products out of the state? The employees of the cooperative would seem to be engaged in a process or occupation necessary to the production of goods which are destined to move out of the state of production. The Wage and Hour Division in Par. 11 ibid. indicates as a "doubtful" case a small mine selling its coal within a state to a local manufacturer engaged in the production of goods for commerce, the manufacturer using the coal to heat his plant or to drive his machinery. "Are the employees of the mine engaged in a 'process or occupation necessary to the production' of the manufacturer's goods which move in interstate commerce? We feel that we should refrain from taking any position on a case which we believe to be so clearly poised on the borderline between coverage and non-coverage. We feel that no opinion can be expressed on the meaning of the words 'process or occupation necessary to the production of goods' as applied to a case such as this . . . until the courts have at least indicated the broad outlines of a meaning to be given to this phrase." A distribution cooperative serving a dairy which sends its products outside of a state would seem to fall within this category.

There are many instances where a cooperative intends to serve across state lines. Are employees engaged in the initial construction of its lines entitled to benefits of the Act? In Pedersen v. Delaware, etc., Railroad Company, 229 U.S. 146, 57 L. Ed. 1125 (1913), the question arose as to whether an employee injured while doing repair work on a tunnel used in interstate commerce was entitled to the state or federal workmen's compensation. It was held that the federal laws would be applicable. A few years later the Supreme Court in Raymond v. Chicago, Milwaukee, etc., 243 U.S. 43, 61 L. Ed. 583 (1917), under a similar factual situation decided that the state law was applicable where the construction was original construction even though interstate commerce was later to be engaged in. The sole distinguishing factor was that in the Pedersen case interstate commerce had already begun. The Wage and Hour Division has up to the present assumed the position that employees engaged in original construction within a state, although interstate commerce is later to be engaged in are not covered by the Act. (See Inter. Bull. No. 5 Ibid. Par. 13.) It is difficult to find a difference between production within a state of a commodity to be sold in interstate commerce, which is regarded as interstate, and original construction of an electric system intended for interstate transmission or distribution. Further, the distinction between the Pedersen and Raymond cases is tenuous and a reversal of the Raymond case, should the problem be presented to the present court, is more than a possibility. Here again care must be taken to consider the factual circumstances surrounding any

given employees. Assuming that original construction is intrastate, there may yet be "particular employees of construction contractors . . . who engage in the interstate transportation of materials or other forms of interstate commerce and are for that reason entitled to the benefits of the Act." Inter. Bull. No. 5 Ibid. Par. 12.

In many instances cooperatives purchase energy at wholesale from without the state, and distribution is local. The selling corporation is undoubtedly engaged in interstate commerce regardless of the location of the wholesale meter whether at the state line or wholly in the state of the selling corporation. See Inter. Bull. No. 5 Ibid. Par. 4. The employees of the selling corporation are thus clearly engaged in the production of goods for interstate commerce under the theory of the Darby case. As to the purchasing cooperatives there are decisions indicating that the criterion of coverage is to be found in the placement of the meter. If the meter is located in another state it is quite clear that the corporation is engaged in interstate commerce. Where the meter is located in the state of distribution, however, it is possible to describe the transaction as a local sale for local distribution making the Act inapplicable. This is in conformity with Supreme Court cases on the subject decided to date. In Public Utilities Com. of Kansas v. Landon, 249 U.S. 236, 63 L. Ed. 577 (1919) in relation to gas, the distinction between interstate and intrastate commerce based on placement of meters was first made. The Wage and Hour Division takes the stand that this rule inevitably will be reversed; that the transmitting of energy from one state to another is a transaction involving interstate power; and that local distribution of interstate power is in the stream of interstate commerce. The part played by the cooperative is necessarily interstate. See Inter. Bull. No. 5 Ibid. Par. 14, 15 and 16. In this connection, reference is made to a note appearing in 52 Harv. L. Rev. 646 (1940) entitled the Federal Wage and Hour Act, in which the same point is made.

Section 16(b) of the Act permits an employee to bring suit for back pay or unpaid overtime compensation "as the case may be, and in an additional amount as liquidated damages". Where any doubt exists as to coverage it is by far the safest procedure to comply with the Act in view of this provision. In any event REA recommends that all borrowers comply with the maximum wage and minimum hour standards set up by the Act, whether or not their employees are engaged in interstate commerce or in the production of goods for interstate commerce.

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RECENT STATUTES

IDAHO: Exemption of Electricity from Taxation.

Senate Bill No. 6, enacted at the 1941 session of the Legislature, exempts from taxation all electricity and all electric energy used for pumping water for irrigation purposes on lands in the State or for the purpose of pumping water for drainage purposes on or from land in the State.

INDIANA: New Public Service Commission.

H. B. 14, effective May 1, 1941. Legislature repealed the Public Service Commission law and enacted legislation creating a new Public Service Commission.

Gross Receipts Tax.

By an Act approved March 8, 1941, the gross income from the sale of electric energy is subject to tax.

NORTH CAROLINA: Foreign Cooperatives Granted Same Privileges as Domestic Cooperative.

H. B. No. 50 permits cooperative electric associations or corporations operating in North Carolina to enjoy the privileges, immunities and benefits accorded to cooperatives operating under the North Carolina Rural Electrification Authority.

OKLAHOMA: Use Tax.

Under provisions H. B. 3 approved February 14, 1941, a tax of 2% is placed on the purchase price of all articles, equipment, etc., brought into the State.

SOUTH DAKOTA: Gross Receipts Tax In Lieu of Other Taxes.

House Bill No. 310 imposes a tax of 2% on the gross receipts from the sale of electric energy for consumption in rural areas. This tax is levied in lieu of all taxes levied by the State, counties, cities, towns, townships or other political subdivisions on the personal property of the company located in the defined rural area.

RECENT CASES

Municipal Corporations - Invalid Delegation of Powers by Contract.

City and T.V.A. entered into a contract contemplating the erection or acquisition of an electrical distribution system by the city and the construction of transmission lines. In the contract, the city agreed to buy electric energy from T.V.A. for a period of twenty years. The court held the contract invalid on the ground that its provisions so limited the discretion of the city as to constitute a delegation by the city of its municipal powers to T.V.A. Middlesboro v. Kentucky Utilities Co., C.C.H. Util. Law Rep. Serv. para. 6213 (Ky. Ct. of App. 1940).

The feeling of the court was that the buying agreement had the effect of causing the city to surrender its powers for the period of twenty years "except by and with the approval of the federal agency". Furthermore, the court felt that the municipality had attempted to limit the power of the state to affect the contract since any legislation by the state on the matter would involve an impairment of the obligation of the contract, if valid. The court recognized that a municipal corporation, in maintaining an electric distribution plant, acted in a proprietory and nongovernmental capacity. Nevertheless, the court stated that the officers of the city "are entrusted with responsibilities and duties that cannot be surrendered or delegated in whole or in part except as may be expressly or impliedly authorized by the law governing the performance of those duties".

Municipal Corporations - Construction of Iowa (Simmer) Law.

Suit in equity was instituted to enjoin the defendant town and its officers from purchasing from Fairbanks, Morse and Company an existing electric light and power plant and distribution system. The plant was to be paid for by the city by the issuance to the selling company of revenue bonds payable solely from the earnings of the plant and expressly excluding payment from taxes. The suit was brought on the ground that the proceedings did not conform to the Simmer Law (Iowa Code, 1939) §§6134.01 to 6134.11. Held, Judgment for defendants affirmed. Gunnar v. Montazooma, C.C.H. Util. Law Rep. Serv., para 6203 (Iowa Sup. Ct. 1940).

The court pointed out that this was the first case before the change involving the purchase of an existing plant under the Simmer Law. The text of the

court's opinion on the questions of interest is as follows: "These sections speak for themselves, and elaboration upon their language does not add greatly to its clarity, nor to the apparent intention of the legislature. Section 6134.08 refers specifically to the contracts mentioned in Section 6134.01, and the words 'any such plant' in the latter section refer to the plants which cities and towns may 'purchase, establish, etc.' as provided in Section 6127. Applicants, therefore, argue that Section 6134.08, et seq., must be complied with in a proceeding to purchase an existing plant, as well as when the transaction is one to construct a plant. Strictly and grammatically speaking, there is support for their contention, but these sections clearly indicate, upon their face, that the contracts referred to therein are construction contracts. They specifically refer to 'proposed plans and specifications and proposed form of contract therefor.' They refer to 'the extent of the work; the kind of materials; when the work shall be done,' and for competitive bids. All of these matters have to do with a construction transaction. They have no application to a plant, fully constructed and open to the inspection of every voter, which a majority of the electors have already voted to purchase. In such a situation, there can be no competitive bidding. Appellants insist that the word 'establishment' as used in Section 6134.08 includes acquisition by purchase. We may concede that its meaning is that broad, but we believe that word was intended to be used in its narrower sense of to bring into being, create, build, set up, etc.' in this section. Such a meaning is consistent with the entire context of the sections. It is our judgment that the proceedings relative to the making of the contract were not violative of any statutory provisions. Appellants contend that Sections 6134.01 to 6134.11 do not authorize the payment of the purchase price of an existing completed plant out of earnings. We are constrained to disagree with appellants on this matter. Section 6127 expressly gives authority to purchase. Section 6134 gives authority to issue bonds to pay the purchase price, and Sections 6134.01, et seq., the Simmer Law, clearly provide for those bonds to be paid solely from the earnings of the plant, and for their delivery to the 'contractor or contractors in payment of such improvement.' To insist, as appellants do, that the word 'contractor' may not include a vendor, is putting too narrow a construction upon the word. Certainly one who enters into a contract to sell a light plant, may properly be referred to as a 'contractor.' . . . Appellants insist that since this court held that the original construction contract between the town and Fairbanks Morse and Company was void, that the plant built under it cannot be purchased by the town, in the manner in which it was done. In our judgment, the manner in which the plant came into being is immaterial, under the circumstances, and does not defeat the contract or purchase. We appreciate the hardship which a proceeding of this kind may cause appellants, but it is a condition which may arise when a municipality decides to own and operate a public service business which has been furnished by private enterprise."

ADMINISTRATIVE INTERPRETATIONS

FEDERAL POWER COMMISSION - LICENSING AUTHORITY OVER TRANSMISSION LINES NOT PRIMARY LINES.

The Federal Power Commission, in a letter addressed to certain Cabinet officials and the Administrator of the Rural Electrification Administration, concluded that transmission lines which are not primary lines transmitting power from a project under the Power Act are not within the licensing authority of the Commission. The pertinent portion of this statement is as follows:

> "It is the Commission's opinion that it is authorized to issue licenses 'for the purpose of constructing, operating, and maintaining dams,

water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several states, or upon any part of the public lands and reservations of the United States (including the territories), or for the purpose of utilizing the surplus water of water power from any Government dam', except as otherwise provided in the Act. Any transmission line, therefore, which is not a primary line transmitting power from the power house or appurtenant works of a project to the point of junction with the distribution system or with the interconnected primary transmission system as set forth in Section 3(11) of the Federal Power Act is not within the licensing authority of the Commission.

"If at any time in the future an application for license should be filed with the Commission covering a line not within the definition of project in Section 3(11) of the Act, such application will be referred to the Department having supervision over the lands or waterways involved. A number of such applications have been filed with the Commission and as rapidly as they may be disposed of they will be referred to the Departments for appropriate action."

FPC Release No. 1475, Mar. 20, 1941.

Sales of electric energy to cooperatives based on different rate schedules as a discrimination. The plaintiff complained to the Public Utility Commission of Pennsylvania that he was in the business of distributing electric energy to the public in certain townships and purchased the current from the Pennsylvania Electric Company under a certain fire tariff. He charged that the power company was discriminating against him by granting a preference to the Northwestern Rural Electric Cooperative Association, in that it was selling energy to the latter at a rate about one-third lower than the rate he paid. The Commission dismissed the complaint. Held, Affirmed. Carpenter v. Pennsylvania Public Utility Commission, C.C.H. Util. Law Rep. Serv., para. 6165 (Pa. Super. Ct., 1940). The Commission, in dismissing the complaint, found the following: "The conclusion is inescapable that the character of service rendered the complainant at the five points of delivery and the class of consumers served by him through his wholly owned eleven electric utilities are dissimilar to the character of service and class of consumers of the cooperative association--first, upon the class and type of consumer served; second, with respect to the requirement of the cooperative's providing its own transforming and appurtenant equipment; and third, with respect to the question of minimum and maximum demand imposed upon respondent's system." The court further noted and concluded that the Commission was justified in permitting the difference in rates because of the substantial difference in the conditions under which the respective services were rendered.

"If at any time in the future an application for licence should be filed with the Commission covering a line not within the definition of 'pilot' in Section 3(11) of the Act, such application will be referred to the Department having supervision over the lands or waterways involved. A number of such applications involve [illegible] filed with the Commission and as they may be disposed of [illegible] will be referred to the Department for appropriate action."